Kansas he had not entered upon the office. In each case the party wished an advance ruling by the court before risking the penalty.

The supreme court of Kansas unanimously upheld the validity of the declaratory judgment act and made the declaration asked. They referred to the *Anway* case as setting forth very fully the arguments against and in favor of its validity, in the majority and minority opinions, but deemed it unnecessary to go over the ground there covered. In regard to the view of the majority of the court as expressed in the *Anway* case, the Kansas court said:

"This view appears to us unsound, and to be the result of confusing declaratory judgments with advisory opinions and decisions in moot cases, and perhaps also of an inclination to treat a general practice that has been long established as having acquired the force of a constitutional guaranty."

The court said that the principle of the declaratory judgment had been practically approved in Kansas in the recent case of *State* v. *Allen,* 107 Kan. 407, where appeals by the state in criminal cases for the purpose of settling points of law, were held to be proper subjects for judicial cognizance. See comment on *State* v. *Allen* in 19 MICH. L. REV. 79.

The supreme court of Kansas has often given convincing demonstration that remedial progress is not incompatible with judicial soundness or constitutional security. The decision just rendered is a further proof that the American system of judicial supervision of legislation can be made workable in a land of rapid social development. E. R. S.

SPECIFIC PERFORMANCE AT LAW—RECOVERY OF FULL AMOUNT OF MATURED INSTALLMENT IN SPITE OF PRIOR REPUDIATION.—Every now and then one finds an illustration of what might with propriety be called judicial myopia,—an inability of the court to see through a phrase or a name to the substance behind it, with results which to the man in the street are apt, not without reason, to appear to lack that element of justice and common sense that has ever been the proud boast of the Common Law. In *George W. Blanchard & Sons Co.* v. *American Realty Co.* (N. H., 1921), 115 Atl. 4, P and D entered into a written contract which provided that "The vendor agrees to sell, and does hereby sell, and the purchaser agrees to buy, and does hereby buy, and agrees to pay for all the pulp timber on a certain tract of land." It was further stipulated that the timber should all be removed by the purchaser within five years, and that he should pay $100,000 for it in four equal annual installments, payment to be made on the first day of April in each of the four years immediately following the date of the agreement. D, the purchaser, cut a small quantity of timber and paid the first installment. When the second installment came due he was sued for it and a judgment rendered against him in *George W. Blanchard & Sons Co.* v. *American Realty Co.,* 79 N. H. 295. Soon thereafter, and before the third installment came due, D notified P that he had abandoned the contract. P refused to acquiesce in the abandonment and when the time for payment of the third installment arrived brought suit to recover the full amount thereof. It was held that

since the written contract was not under seal it could not, in view of the New Hampshire statute (P. S. c. 137, sec. 3), transfer any title to or interest in the trees; that what D got was a mere "license" to enter, cut trees and by that act acquire title to them; that the fact that he did not choose to exercise his license could not deprive P of his right to the full contract price since, "when the contract was executed nothing remained to be done by the plaintiff."

Even the most superficial analysis seems to indicate that the court's position is an inconsistent and untenable one. It has apparently misled itself by the use of the "convenient and seductively obscure" word, license,—a word which is commonly used indiscriminately with any one of a number of separate and distinct connotations. Among other things it may be used to refer to a mere gratuitous permission to go upon land, revocable at the pleasure of the land-owner and not imposing any duties whatsoever upon him. See *Nowlin Lumber Co.* v. *Wilson,* 119 Mich. 406; *Houston* v. *Laffee,* 46 N. H. 505. Or it may refer to a so-called permission, or right or series of rights to go upon land, acquired by contract, with a correlative contractual duty or series of contractual duties devolving upon the landowner. Such a contract creates no rights or interest in the land, as the phrase is, and consequently the licensor has the power to break it by withdrawing the permission. However, such withdrawal of permission renders him liable to an action for damages for breach of contract (see *Wood* v. *Leadbitter,* 13 M. & W. 838; *King* v. *David Allen & Sons, Billposting, Ltd.,* [1916] 2 A. C. 54; 13 MICH. L. REV. 401) or perhaps to a suit in equity for specific performance if the remedy at law is inadequate. See *Hurst* v. *Picture Theatres Ltd.,* [1915] 1 K. B. 1. That such a contract is not fully performed by the licensor until the full period for which the permission is given has expired seems too clear for argument. It may be true, as stated by the court in the principal case, that the mere fact that the seller still has certain negative obligations does not prove that the contract is still executory (citing *Fletcher* v. *Peck,* 6 Cranch 87, 137), yet a more complete *non sequitur* could not be well imagined than to say that from this it follows that one to whom negative obligations alone attach has therefore fully performed his contract. In *McCrea* v. *Marsh,* 12 Gray 211, 212-213 it is said, *semble,* "Assuming that the plaintiff, by purchase of the ticket from the defendant, obtained permission to enter the family circle in the Howard Athenaeum, in his own person, and occupy a place there during the exhibition, yet it was 'only an executory contract.' It was a license legally revocable, and was revoked before it was in any part executed." See also *Buenzle* v. *Newport Amusement Assn.,* 29 R. I. 23; *Kerrison* v. *Smith,* [1897], L. R. 2 Q. B. 445. Again it may be used to mean what is called an irrevocable permission to go upon land, acquired either by a contract to convey or by an ineffectual attempt to convey an interest in land, construed as a contract to convey. Such contracts are specifically enforcible in equity and create an equitable interest which, in principle at least, is not distinguishable from an easement or a profit, as the case may be. *Duke of Devonshire* v. *Eglin,* 14 Beav. 530; *Ashelford* v.

Willis, 194 Ill. 492. In such a case also it seems quite clear that the licensor has not fully performed his contract in any true sense until the conveyance has been executed, unless we are willing to admit what the court in the principal case seems expressly to deny, *viz.,* that an interest in land may be created without a grant. It must be admitted that this is the effect of some of the cases, but in them there is present an element not present here, *viz.,* a promissory estoppel. See *Rerick* v. *Kern,* 14 S. & R. 267; *Ruthven* v. *Farmers Coöperative Creamery Co.,* 140 Ia. 570; TIFFANY REAL PROPERTY, [Ed. 2], sec. 349d.

The court in the principal case, cavalierly and with a vagueness characteristic of cases involving licenses, fails to determine the exact nature of the rights acquired by D. That a correct solution of the problem involved depends upon such a determination as well as upon other factors, must be apparent. If the contract is to be interpreted as one intended to assure the grant of a profit, then we have the case of a contract to convey in which the money is to be paid in installments at definite dates, no time being set for making the conveyance. If to this situation we should apply rule number one laid down bv Sergeant Williams in his note to *Pordage* v. *Cole,* 1 Wm. Saund. 319*i,* we should have to say that the promises to pay are absolute and independent, and that therefore P is entitled to recover the full amount of each installment as it matures, no matter what happens. However, it is doubtful whether this rule would be regarded as uniformly applicable by a modern court since it is often in conflict with the underlying theory of dependency of promises. See *e. g. Taul* v. *Bradford,* 20 Tex. 261. But cf. *Busch* v. *Stromberg-Carlson Tel. Mfg. Co.,* 217 Fed. 328, 332. Neither is it reasonable to hold that the promise to pay the last installment and the promise to convey are mutually concurrent conditions, as is usually held in cases involving a contract to convey a fee, *Beecher* v. *Conradt,* 3 Kernan 108; *Eddy* v. *Davis,* 116 N. Y. 247, for if this construction were placed upon the agreement in the principal case, it would follow that at the time set for conveyance there would no longer be anything to convey, since the last installment was not payable until very near the time when the profit was by its terms to come to an end.

The case seems more nearly analogous to those involving a contract to grant a leasehold estate at an agreed rental payable in installments at fixed dates. In these cases it is quite uniformly held in effect that the execution of the lease is a condition precedent to the right to rent. If the prospective lessee refuses to take a lease the landowner recovers simply the value of his bargain, i. e. the difference between the agreed rent and the rental value of the premises. *Silva* v. *Bair,* 141 Cal. 599; *Post* v. *Davis,* 7 Kan. App. 217; *Cleveland* v. *Bryant,* 16 S. C. 634; *Oldfield* v. *Angeles Brewing & Malting Co.,* 62 Wash. 260; Ann. Cas. 1912 C 1050 and note citing other cases. This is true even though the landlord has not acquiesced in the refusal to take a lease but has permitted the premises to remain vacant expecting to hold the prospective lessee for the rent. See *Oldfield* v. *Brewing and Malting Co., supra.*

On the other hand if D got simply a series of contractual rights to go upon P's land, then we have the question as to whether or not D could by repudiating the contract during the course of performance compel P to do all in his power to make the most out of the unexercised portion of the series of rights remaining at the time of the repudiation. In effect it becomes simply a rather unique case calling for an application of the principle which denies to an innocent contracting party the right to recover avoidable damages. That the mutual promises in such a contract are not wholly independent and absolute is apparent when we consider what the court would in all probability have done had P repudiated or failed wrongfully to fulfill its promise to permit D to cut timber unmolested. It would seem to be in accord with principle to require P to make a reasonable effort to dispose of the remainder of the series of unexercised rights after notice of repudiation or else to have their value deducted from the amount of damages recoverable in an action for breach of contract. The case from this point of view is not unlike the employment contract cases in which it is quite generally held that an employee who has been wrongfully dismissed is bound to make a reasonable effort to find other employment. *Maynard* v. *Royal Worcester Corset Co.*, 200 Mass. 1; *Hinchcliffe* v. *Koontz*, 121 Ind. 422; *Byrne* v. *School Dist.*, 139 Ia. 618. Compare also the cases involving correspondence school contracts in which tuition is made payable in installments at fixed dates, no time being set for the furnishing of instruction. According to the better rule in such cases, where the pupil repudiates his contract the school can recover simply damages for breach of contract and not the face value of the installments. *International Text Book Co.* v. *Martin*, 82 Neb. 403; *International Text Book Co.* v. *Roberts*, 168 Mich. 501 and cases therein cited. *Contra*, is *International Text Book Co.* v. *Martin*, 221 Mass. 1. As is said in *Payzu Ltd.* v. *Saunders*, [1919] 2 K. B. 581, "what is reasonable for a person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstances of each particular case."

To allow P to recover the full amount of the installments under these circumstances is simply to enforce a penalty. If specific performance is ever to be made available as a remedy at law certainly it should be confined to cases like those involving the sale of chattels (see 17 MICH. L. REV. 283) in which the legal machinery is adequate to secure at least a fair measure of justice for the defendant. G. C. G.